

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AUGUSTINE MARTINEZ,

Petitioner,

V.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL
INSTITUTIONS DIVISION,¹

Respondent.

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CIVIL ACTION NO. H-09-0699

ORDER ADOPTING RECOMMENDATION
OF THE MAGISTRATE JUDGE

Pending is Petitioner's Federal Application for Writ of Habeas Corpus (Document No. 1). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that Petitioner's Application for Writ of Habeas Corpus (Document No. 1) be DENIED. No objections have been filed to the Memorandum and Recommendation. The Court, after having made a *de novo* determination of Petitioner's Application for Writ of Habeas Corpus, and the Memorandum and Recommendation, is of the opinion that the findings and recommendations of the Magistrate Judge are correct and should be and hereby are accepted by the Court in their entirety. Accordingly,

¹ Rick Thaler, the new Director of the Texas Department of Criminal Justice, Correctional Institutions Division, is substituted as Respondent. See FED. R. CIV. P. 25(d).

It is ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge signed and filed on August 24, 2009, which is adopted in its entirety as the opinion of this Court, that Petitioner's Federal Application for Writ of Habeas Corpus (Document No. 1) is DENIED, and this § 2254 proceeding is DISMISSED WITH PREJUDICE as time-barred. It is further

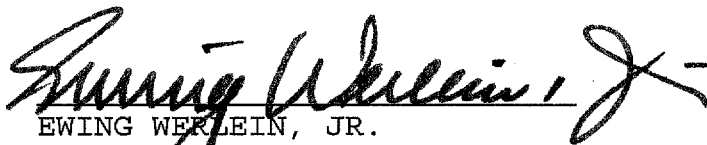
ORDERED that a certificate of appealability is DENIED. A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 120 S. Ct. 1595, 1603-1604 (2000) (internal quotations and citations omitted). Stated differently, where the claims have been dismissed on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 1604; Beasley v. Johnson, 242 F.3d 248, 263 (5th Cir.), cert. denied, 122 S.Ct. 329 (2001). When the claims have been dismissed on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was

correct in its procedural ruling." Slack, 120 S. Ct. at 1604. A district court may deny a certificate of appealability *sua sponte*, without requiring further briefing or argument. Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000).

For the reasons set forth in the Memorandum and Recommendation, which has been adopted in its entirety as the opinion of the Court, the Court concludes that reasonable jurists would not debate the correctness of the limitations ruling.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas this 30th day of October, 2009.


EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE